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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/879,418	06/12/2001	Steven C. Robie	5122USAC1	6193
7590 John A. O'Toole P.O. Box 1113 Minneapolis, MN 55440			EXAMINER CORBIN, ARTHUR L.	
			ART UNIT 1761	PAPER NUMBER
DATE MAILED: 04/01/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/879,418

Applicant(s)

ROBIE ET AL eb

Examiner

ARTHUR L. CORBIN

Group Art Unit

1761

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- ☒ Responsive to communication(s) filed on 3-4-04
- ☒ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

- ☒ Claim(s) 30-37 is/are pending in the application.
- Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 30-37 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☐ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement

### Application Papers

- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some\* ☐ None of the:
- ☐ Certified copies of the priority documents have been received.
- ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
- ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

\*Certified copies not received: \_\_\_\_\_

### Attachment(s)

- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). \_\_\_\_\_
- ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948
- ☐ Other \_\_\_\_\_

Office Action Summary

1. The finality of the Office Action dated December 2, 2003 is withdrawn and the following action rendered.

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 30-37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 30-37 are indefinite since it is not clear to what "per gram" (claim 30, last line) refers. Correction is required without new matter.

4. Claim 30 is objected to because of the following informalities: In claim 30, last line, after "and" the word "being" should be added. Appropriate correction is required.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 30-34 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Holtz et al (5,510,130, columns 4, 5, 7 and 18-20).

Applicant is referred to the reasoning set forth in paragraph No. 2 of the December 2, 2003 Office Action.

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7. Claims 35 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Holtz et al as applied to claims 30-34 and 37 above, and further in view of Schwab et al (5,338,556).

Applicant is referred to the reasoning set forth in paragraph No. 3 of the December 2, 2003 Office Action.

8. Applicant's arguments filed March 4, 2004 have been fully considered but they are not persuasive. Applicant contends that since the claimed grain bits are from the same quantity of grain used to make the claimed dough, as opposed to the added grain bits of Holtz et al, a product distinct from the product of Holtz et al is produced. While such a distinction may carry some weight in a method of making claim, it has no affect in distinguishing applicant's product over Holtz et al's product. Grain bits from the same quantity of dough are not patentably distinct from grain bits added to a dough material. In both instances, a dough product including cooked grain bits is produced (see Holtz et al, column 4, line 54). Both products will look the same, feel the same, taste the same and smell the same.

Additionally, after the grain bits are added to the dough, the dough is formed into flakes and then toasted. This will result in cooked cereal flakes including cooked grain bits. The final product does not know where the grain bits came from. It is thus substantially equivalent to applicant's claimed product. It is also irrelevant when the grain bits are added to the product so long as they are part of the final product.

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Finally, applicant's contention, that the claimed grain bits are different in structure from the grain bits in Holtz et al, is not understood. What structural differences exist and where are they claimed?


9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Any inquiry concerning this communication from the examiner should be directed to Arthur L. Corbin whose telephone number is (571) 272-1399. The examiner can generally be reached on Monday—Friday from 10 a.m. to 7:30 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application is assigned is (703) 872-9306.

A. Corbin/dh  
March 25, 2004

  
ARTHUR L. CORBIN  
PRIMARY EXAMINER  
3-30-04